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December 22, 1994

VIA HAND DELIVERY

William F. Caton
Acting Secretary
Federal Communicatons Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: ET Docket No. 93-62

Dear Mr. Caton:

Transmitted herewith for filing with the Commission on behalf of the Electromagnetic Energy Association are an original and nine copies of its Petition for Further Notice of Proposed Rulemaking in the above-captioned proceeding, requesting the Commission pursuant to Sections 1.401 and 1.421 of its Rules to adopt a rule preempting state and local regulation of RF energy issues to the extent such regulations are inconsistent with the FCC's own RF standards.

Should there be any questions regarding this matter, please communicate with this office.

Very truly yours,

John I. Stewart, Jr.

cc: Honorable Reed Hundt, Chairman
Honorable James H. Quello
Honorable Andrew C. Barrett
Honorable Rachelle B. Chong
Honorable Susan Ness

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	ET Docket No. 93-62
Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation	)	RM- _____

PETITION FOR FURTHER NOTICE OF PROPOSED RULEMAKING

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December 22, 1994

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SUMMARY

The Environmental Energy Association ("EEA"), a coalition of companies and associations representing a broad spectrum of communications services from broadcasting to cellular, PCS and other land mobile services, requests the Commission to issue a Further Notice of Proposed Rulemaking in this proceeding and to adopt a rule preempting state and local regulation of the RF energy aspects of FCC-authorized antenna facilities to the extent such regulation is inconsistent with the FCC's own RF standards.

The nation stands at a critical juncture, as important new communications services are being introduced and existing services are being improved and expanded through new technologies. The resulting wireless communications environment, encompassing broadcasting, cellular, private land mobile and new services such as PCS, will be essential to the successful implementation of federal telecommunications policies, including the development of the National Information Infrastructure. State and local regulations that are inconsistent with the FCC's regulations and unduly impede or even prevent the construction and operation of FCC-authorized facilities will undercut the realization of these federal policy objectives.

Under these circumstances, the Commission has clear authority to preempt state and local regulation. First, it is authorized by Congress, under the Communications Act and the National Environmental Policy Act, to adopt rules governing exposure to electromagnetic energy associated with the operation of

authorized antenna facilities. It is further mandated under the Communications Act to provide for a rapid, efficient, nationwide wireless communications service, to encourage the provision of new technologies and services to the public, and to assure a fair, efficient and equitable distribution of radio service. 47 U.S.C. §§ 151, 157(a), 307(b). Thus, under the Supremacy Clause of the U.S. Constitution, the Commission has the authority to preempt state and local RF regulations to the extent they interfere with the implementation of congressionally mandated policy objectives.

The factual evidence currently available strongly supports the Commission's exercise of this authority. Examples collected by EEA and presented by commenters in this proceeding demonstrate that a wide variety of state and local regulations addressing RF energy considerations have delayed or prevented the construction and operation of FCC-authorized broadcast, common carrier and private land mobile antenna facilities, have required less than optimal operation of FCC-authorized facilities, or have imposed additional costs and licensing requirements on FCC-authorized facilities. Increasing attention by state and local regulators to RF issues, coupled with the increasing number of new antennas that must be built within the near future, will continue to intensify the conflict.

The Commission has stated that it "will not hesitate" to adopt an RF preemption rule at such time as it is presented with the evidence supporting the need for such a rule. EEA respectfully submits that that time has now come, and requests that the Commission issue a Further Notice of Proposed Rulemaking to preempt state and local RF regulation.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	ET Docket No. 93-62
Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation	)	RM- _____

To: The Commission

PETITION FOR FURTHER NOTICE OF PROPOSED RULEMAKING

Pursuant to Sections 1.401 and 1.421 of the Commission's Rules, the Electromagnetic Energy Association ("EEA"), by its attorneys, hereby requests the Commission to issue a Further Notice of Proposed Rulemaking in this proceeding, and to adopt a rule that would preempt state and local regulation of electromagnetic energy matters to the extent such regulation is inconsistent with the standards adopted by the Commission to govern the construction and operation of FCC-licensed transmission antennas.[1]

[1] EEA believes the record in this proceeding warrants the prompt issuance of a Further Notice of Proposed Rulemaking under Section 1.421 of the FCC's Rules, seeking comment on the substance of a proposed preemption rule.

I. INTRODUCTION

The Electromagnetic Energy Association is a coalition of companies and trade associations representing a broad spectrum of communications businesses, from broadcasting to cellular to the full range of other land mobile communications services, such as paging, specialized mobile radio, "broadband" and "narrowband" personal communications services and two-way dispatch radio services.[2] EEA's principal objective is the advancement of knowledge about electromagnetic energy issues associated with the operation of communications facilities and devices.

On April 8, 1993, the Commission issued its Notice of Proposed Rule Making in this proceeding, 8 FCC Rcd 2849 (1993), ("RF NPRM"), in which it proposed to amend and update the guidelines and methods used for evaluating the environmental effects of electromagnetic energy associated with FCC-regulated facilities, and to adopt the standard for RF exposure promulgated in 1992 by the American National Standards Institute ("ANSI") in association with the Institute of Electrical and Electronics Engineers ("IEEE") (the "1992 ANSI standard"). In responding to the RF NPRM, a number of parties independently raised the issue

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[2] EEA was first formed in 1984 as the "Electromagnetic Energy Policy Alliance." It has taken an active role in promoting informed decisionmaking on public policy relating to the safe use of electromagnetic energy, as to which its members have a unique and authoritative body of knowledge. A list of members of EEA is attached as Exhibit A.

of preemption, all but one urging the Commission to preempt state and local RF regulation in conjunction with adopting a new RF standard.[3]

EEA believes that the time has now come for FCC preemption of state and local regulation of electromagnetic energy. The introduction of important new communications services is on a collision course with increasing state and local activity in the area. The social, technological and economic benefits of future advancements in communications services -- including Advanced Television ("ATV"), Digital Audio Broadcasting ("DAB"), PCS and Cellular services -- cannot be realized if the construction of FCC-authorized facilities is delayed or precluded altogether by state or local regulation applying electromagnetic energy standards that are inconsistent with those adopted by the Commission. And as the Administration's Agenda for the National Information Infrastructure, which will rely on wireless communication links, makes clear, the stakes are high:

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[3] The following entities filed comments in ET Docket No. 93-62 recommending preemption of state and local regulation of RF standards: AMSC Subsidiary Corporation; The American Radio Relay League; Association for Maximum Service Television, Inc., jointly with the National Broadcasting Company, Inc.; CBS, Inc., jointly with Capital Cities/ABC, Inc., Greater Media, Inc., Tribune Broadcasting Company and Westinghouse Broadcasting Company, Inc.; Celpage, Inc.; Cohen, Dippell & Everist, P.C.; Sheldon L. Epstein, Esq.; The Ericsson Corporation; Hammett & Edison, Inc.; McCaw Cellular Communications, Inc.; National Association of Business and Educational Radio (now consolidated into the Personal Communications Industry Association); National Association of Broadcasters; National Public Radio; New Jersey Broadcasters Association; PacTel Corporation; Louis A. Williams, Jr., P.E. The Village of Wilmette, Illinois, filed reply comments asserting that its own cellular antenna rules should not be subject to preemption.

> The benefits of the NII for the nation are immense. An advanced information infrastructure will enable U.S. firms to compete and win in the global economy, generating good jobs for the American people and economic growth for the nation. As importantly, the NII can transform the lives of the American people -- ameliorating the constraints of geography, disability, and economic status -- giving all Americans a fair opportunity to go as far as their talents and ambitions will take them.

The National Information Infrastructure: Agenda for Action, at p. 2.

In the past, the Commission has declined to preempt state and local regulation of electromagnetic energy matters on the ground that the record before it at the time did not warrant preemption. National Association of Broadcasters, 5 FCC Rcd 486 (1990); Responsibility of the Federal Communications Commission to Consider Biological Effects of Radiofrequency Radiation (hereinafter "RF Radiation Proceeding"), 58 RR 2d 1128, 1131 (1985). The Commission stated that it would address conflicts caused by state and local RF regulation on a case-by-case basis, but emphasized that it "will not hesitate to consider" preemption if states and localities adopt RF standards that adversely affect its licensees' ability to provide authorized services. RF Radiation Proceeding, 100 FCC 2d 543, 558 (1985).

The Commission's case-by-case approach is no longer satisfactory. Preemption is warranted now. Communications service providers are already facing state and local RF regulation that is impairing their ability to provide services ranging from radio and television to cellular and paging services. This impairment, taken as a whole, threatens the continued advancement of existing

communications services, as well as the development and introduction of new communications technologies, intended by Congress and the Commission. The Commission has both the authority and the evidentiary basis to adopt a rule preempting state and local regulations of FCC-authorized transmission facilities that are inconsistent with the Commission's own RF radiation rules. EEA respectfully requests that the Commission issue a Further Notice of Proposed Rulemaking seeking comment on its adoption of such a rule as part of this proceeding.

II. THE COMMISSION HAS THE AUTHORITY TO PREEMPT STATE AND LOCAL REGULATION THAT UNDULY IMPEDES THE IMPLEMENTATION OF FEDERAL POLICY

The Commission has the power, when "acting within the scope of its congressionally delegated authority," to preempt state or local regulation which conflicts with federal law and "stands as an obstacle to the accomplishment and execution of the full objectives of Congress." Louisiana Public Service Comm'n v. FCC, 476 U.S. at 368-69 (1986) (*citing* Hines v. Davidowitz, 312 U.S. 52 (1941)). This preemption authority, which is grounded in the Supremacy Clause of the U.S. Constitution, Art. VI, cl. 2, is fundamental to the proper working of our federal system. In the case of electromagnetic energy regulations applicable to FCC-licensed transmission facilities, both preconditions for exercising federal preemption are fully met.

A. The Commission's Adoption of RF Radiation Standards Is "Within the Scope of its Congressionally Delegated Authority."

The Communications Act specifies that the Commission's purpose is "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151. In furtherance of this essential purpose, the Commission is granted the power to "make such rules and regulations, and issue such orders, not inconsistent with [the Act], as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). This broad Congressional grant of authority necessarily encompasses the power to authorize construction of and prescribe operating requirements for the transmission facilities used by FCC licensees in providing wire and radio communications services. The Supreme Court has held that the Act grants the FCC broad and flexible powers, so that it may respond to dynamic changes in the communications field. See, e.g., National Broadcasting Co. v. United States, 319 U.S. 190, 217, 219 (1943) (the Act grants "comprehensive powers" which are "not niggardly but expansive"); United States v. Southwestern Cable Co., 392 U.S. 157, 172-78 (1968) (Commission's general statutory authority permits regulation of non-licensee cable systems whose activities threaten the achievement of the Commission's goals for broadcasting) . The Act thus plainly authorizes FCC regulations governing electromagnetic energy, the necessary product of the operation of FCC-licensed transmitters.

Moreover, the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq*, provides specific supplemental authority to the Commission to evaluate the environmental effects of licensed transmitters and to impose conditions under which such transmitters may be operated. See 42 U.S.C. § 4335 (policies and goals set forth in NEPA are "supplementary to those set forth in existing authorizations of Federal agencies"); Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1112 (D.C. Cir. 1971) (requirements of NEPA have become "a part of the mandate of every federal agency and department"). The Commission and other agencies are mandated by NEPA to "initiate measures needed to direct their policies, plans, and programs so as to meet national environmental goals." Exec. Order No. 11514, 35 Fed. Reg. 4247 (1970), amended by Exec. Order No. 11991, 42 Fed. Reg. 26967 (1977).

In adopting the current RF radiation standards, the Commission stated that NEPA "requires us to consider the environmental impact of the operations and facilities we license or approve." RF Radiation Proceeding, 100 FCC 2d 543, 552 (1985). See also, e.g., RF Radiation Proceeding, 89 FCC 2d 214, 254-55 (1982); RF Radiation Proceeding, 72 FCC 2d 482, 488 (1979); Implementation of the National Environmental Policy Act of 1969, 49 FCC 2d 1313 (1974); Establishment of Domestic Communications -- Satellite Facilities by Non-Governmental Entities, 38 FCC 2d 665, 704 (1972).

Adopting electromagnetic energy standards is thus within the Commission's delegated authority, under both the Communications Act and NEPA. This

authority is not affected by Section 2(b) of the Communications Act, which excludes from the Commission's jurisdiction all "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier." 47 U.S.C. § 152(b)(1). As the Supreme Court has acknowledged, where it is not possible to separate interstate and intrastate aspects of communications services or facilities, Section 2(b) does not limit the FCC's jurisdiction. Louisiana Public Service Comm'n v. FCC, 476 U.S. at 375-76 & n.4. Specifically, where the exercise of state jurisdiction over communications facilities would as a practical matter negate the federal regulation, federal jurisdiction must prevail. Id. (*citing* North Carolina Utilities Comm'n v. FCC, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976), and North Carolina Utilities Comm'n v. FCC, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977)). Since a local RF regulation that prevents the construction of an antenna necessarily prevents its use for both intrastate and interstate communications, the intrastate and interstate aspects cannot be separated, and Commission jurisdiction is thus not limited by Section 2(b) of the Act.

B. Inconsistent State and Local Regulation of RF Radiation From FCC-Licensed Antenna Facilities "Stands as an Obstacle to the Accomplishment and Execution of the Full Objectives of Congress."

As described more fully in Section III, state or local regulation of the electromagnetic energy aspects of FCC-licensed antenna facilities that is

inconsistent with the Commission's own standard "stands as an obstacle to the accomplishment and execution of the full objectives of Congress." See Louisiana Public Service Comm'n v. FCC, 476 U.S. at 368-69. Where the state or local regulation impedes, delays or precludes the construction or operation of, for example, a new broadcast, cellular, ATV or PCS antenna, it will prevent the expeditious and efficient provision of new or expanded communications services fully authorized by the Commission. The Commission can and should preempt such regulation in order to accomplish the policies Congress has directed it to promote.

For example, in proposing a nationwide Personal Communications Service, the Commission stated: "It is essential that our decisions on PCS spectrum and regulatory structure furnish PCS providers the ability to reach and serve existing and new markets in an economic and responsible manner." Personal Communications Services, 73 RR 2d 462, 463 (1992). Two of the goals of the Commission's regulatory structure for PCS are universality and speed of development. Id. Moreover, in order to ensure the expeditious initiation of service, the Commission adopted a requirement that all narrowband PCS providers meet the 1992 ANSI standard proposed in this proceeding for all licensees. Personal Communications Services, 73 RR 2d 435, 446 (1993).

Similarly, with regard to ATV, efficient service and expeditious implementation are critical to Commission policies. See Advanced Television Systems, 68 RR 2d 163, 165 (1990) (primary goal for ATV is "to allow the

development of a technically excellent ATV service that will most efficiently meet the needs of" broadcasters, cable TV operators and consumers).

The expeditious and efficient implementation of new, nationwide communications services is thus an important federal policy. See also 47 U.S.C. § 157(a) ("It shall be the policy of the United States to encourage the provision of new technologies and services to the public"). Similarly, the authorization of improved facilities for conventional radio and television broadcast stations is critical to achieving the statutory mandate of "a fair, efficient, and equitable distribution of radio service" as the U.S. population grows and changes. 47 U.S.C. § 307(b). However, these important policies cannot be achieved if state and local regulators are allowed to obstruct the use of transmitter sites needed to provide new or expanded service or to impose costs and other regulatory burdens on FCC licensees that make it more difficult and expensive to provide service.

In similar instances, the Commission has preempted state and local regulation which interfered with the Commission's duty to "foster the development of national communications service." Earth Satellite Communications, Inc., 95 FCC 2d 1223, 1234) (preempting state regulation of SMATV). The Commission has also preempted state and local regulations that impede the interstate operation of FCC-authorized facilities in order to ensure that the licensed facilities may operate in accordance with the standards and policies set by the Commission. See Amateur Radio Facilities, 101 FCC 2d 952 (1985). As described in Section III, state and local regulation of electromagnetic energy aspects of licensed

transmitters is no less an impediment to implementation of FCC facilities than in these cases.

III. STATE AND LOCAL REGULATION OF RF TRANSMITTERS JEOPARDIZES THE DEVELOPMENT OF TELECOMMUNICATIONS SERVICES THROUGHOUT THE NATION.

Over the last ten years, the amount and diversity of state and local regulation of electromagnetic energy has dramatically increased. Such regulation takes the form not only of statutes and ordinances imposing explicit electromagnetic energy standards but also of case-by-case evaluations of the environmental effects of electromagnetic energy in the course of zoning and other regulatory proceedings. In many cases, such regulation may condition operation of antenna facilities on compliance with a standard inconsistent with the Commission's RF standard or require Commission licensees to prove that their proposed transmissions are within some ill-defined "safe" level of RF emissions, even though the licensees are in full compliance with the Commission's RF standards. Moreover, local regulatory decisions cannot be expected to take proper account of the goals of the Commission and Congress to achieve the federal plan for telecommunications services throughout the nation. The result of these regulatory incursions by state and local governments is a patchwork quilt of regulatory requirements for Commission licensees, which obstructs the full realization of the Commission's goals and policies.

The anecdotal evidence already available to the Commission strongly supports preemption. The examples described in this section come from states and localities throughout the country. They cover a range of types of interference, from direct regulation of electromagnetic energy to ad hoc consideration of RF issues by local authorities. They involve broadcast, common carrier and private land mobile facilities. They include cases in which proposed antenna facilities were not built, were built in locations or configurations that provided inferior service, or were required to be operated at less than full power or capacity. In many cases in which antenna facilities were built as authorized, it was only after long delays and significant additional expense. In all these cases, state or local regulation of electromagnetic energy created impediments to the construction and operation of facilities that had already been affirmatively authorized as promoting the FCC's communications policy goals, and as meeting its RF radiation standards.

As the nation stands at the threshold of a new wireless digital environment, in which new transmitter facilities will be the means by which countless U.S. companies provide a wide range of new communications services to the American people, it is critically important to clear away unnecessary obstacles. As these new markets begin to develop, the Commission should exercise its clear authority to preempt state and local regulation of electromagnetic energy, to assure the full and expeditious implementation of its decisions authorizing the introduction of new communication services and the continued improvement of existing services.

A. A Growing Number of Divergent State and Local RF Regulations Threaten the Development of Uniform Communications Services Throughout the Nation.

Comments by a number of parties in this proceeding have already presented evidence of the growing need for preemption. The EEA has gathered additional information about a variety of state and local regulatory schemes that raise concerns. Among the examples it has collected are the following:

- Colorado. Jefferson County, immediately adjacent to Denver, has adopted zoning ordinances which regulate the amount of non-ionizing electromagnetic radiation which telecommunications facilities may emit.[4] Although these regulations incorporate the 1992 ANSI standard, they expressly provide for the use of a more stringent standard if adopted by a locality.

- Connecticut. The City of Stamford has adopted an ordinance which is based on the premise that non-ionizing radiation may be hazardous to human health.[5] It requires that any entity must first receive approval from the Stamford Health Department before constructing a transmitter involving greater than 5 watts of input into the antenna array. The Health Department requires applicants to fund a review and hearing by a panel of three experts, which are to be guided by the ANSI standard or a more stringent state standard, if adopted.

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[4] See Jefferson Cty. Reg., § 2, ¶ P(1)(a) (Exhibit B).

[5] See Ordinance No. 527 Supplemental Concerning Microwave Transmitters (Exhibit C).

- Illinois. In 1993, the Village of Wilmette adopted an RF standard more stringent than the 1992 ANSI standard.[6] In addition to imposing a specific limit on a transmitter's power density, the Village also prohibits installation of a proposed facility within 500 feet of properties occupied by schools, pre-schools and daycare centers.

- Oregon. The City of Portland has passed a zoning ordinance specifying maximum RF emissions levels.[7] The limits are the same as those specified for the 1992 ANSI standard for uncontrolled environments, but the ordinance makes no distinction between controlled and uncontrolled environments. Similarly, Washington County enacted regulations limiting RF exposure in all environments to the same limits specified in the 1992 ANSI standard for uncontrolled environments.[8] A basic premise of the 1992 ANSI standard under consideration by the FCC is that environments which involve different levels of human exposure warrant different emission and exposure limits. Thus, non-differentiated regulations such as Oregon's impose stricter requirements on licensees than would the Commission's proposed rules.

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[6] Resolution 93-R-34 (Exhibit D).

[7] Title 33, Portland Planning & Zoning Ch. 33:274 (1992) (Exhibit E).

[8] Wash. Cty. Code 430-109.3(E)(1) (Exhibit F).

- Washington. Both the City of Seattle[9] and King County[10] have adopted limits for all transmitters that are the same as the 1992 ANSI standard for uncontrolled environments.

There are many communities that have adopted some form of the ANSI standard proposed in this proceeding for FCC applicants. The patchwork effect of these regulations, however, cannot be avoided. Even for communities using the same standard as the Commission, the application of that standard may vary from place to place. Some local governments also impose additional burdensome requirements that applicants prove that use of a proposed transmitter site is "safe," regardless of compliance with electromagnetic energy standards, or that applicants fund additional studies to evaluate the impact on the human health environment. As long as state and local regulators have the authority to apply local standards in ways inconsistent with the FCC's application of its RF radiation standards, a Commission licensee cannot be assured that its licensed transmitter site will be available as approved by the Commission, or, in the case of PCS and cellular systems, that it will be able to use the same transmitter array from site to site within a single market encompassing multiple communities.

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[9] Seattle City Code 25.10.300 et seq. (1992) (Exhibit G).

[10] 21 King Cty. Code § 10 (Exhibit H).

B. State and Local Regulation of RF Emissions Has Obstructed the Construction and Operation of FCC-Licensed Facilities.

State and local governments have often applied local standards covering electromagnetic energy -- whether explicit or implicit -- in a manner that obstructs construction or operation of a transmitter approved by the Commission. With many new transmitter sites being located for ATV, PCS and other new services, this phenomenon is likely to increase in frequency in the future.

For example, KRON-TV applied to the San Francisco Planning Commission for a conditional use zoning permit to expand its Mt. Sutro Tower facilities. In order to approve the permit, the Planning Commission was required to determine that the use "will not be detrimental to the health, safety, convenience or general welfare of persons residing or working in the vicinity."[11] The Planning Commission found that "there is substantial public concern surrounding the issue of electromagnetic radiation in San Francisco and, more specifically, that a locus of this concern is the Mt. Sutro Television and radio tower."[12] Based on testimony "which was rendered in such a way as to create an aura of doubt and uncertainty as to the safety of exposure to electromagnetic radiation," the Planning Commission voted to disapprove KRON-TV's application.[13] Thus, testimony creating an "aura of doubt" was sufficient to defeat the improvement of KRON's

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[11] See San Francisco City Planning Commission Resolution No. 11399 (Exhibit I) (citing San Francisco City Planning Code, § 303).

[12] Id.

[13] Id.

facilities regardless of whether those facilities had been found to have no significant environmental impact under the FCC's RF standards.

Similarly, in West Hollywood, California, the City Council in July 1993 passed resolutions denying the addition of cellular telephone towers at two locations.[14] Both facilities had been approved by the Planning Commission. However, an appeal was taken to the Council based on health concerns. Although the decision was not based on any specific power limits, the Council denied both applications, stating that "[the] evidence put forth by the applicant and others in support of the project was inconclusive because no witness or evidence presented concluded that the proposed use of the property was safe."[15]

In another case, the licensee of KBVU(TV) was forced to relocate an antenna after its site application was denied by the Eureka, California, Planning Commission, based on the amount of RF energy that would be created at an antenna farm.[16] The Planning Commission was reportedly asked whether it would reconsider the application if it were shown that the FCC approved the additional radiation at the site under ANSI standards, but rejected that proposal, stating that the FCC's determination would make no difference.[17]

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[14] City of West Hollywood City Council Resolution Nos. 1160 and 1161 (July 1993) (Exhibits J and K).

[15] Id.

[16] See Report of Chester Smith, General Partner, KBVU(TV) (Exhibit L).

[17] Id.

Because so many transmitter sites are needed for cellular systems, cellular radio operators frequently experience delay and obstruction at local levels. In its comments in this proceeding, McCaw Cellular Communications, Inc., reported on a series of problems in attempting the rollout of its cellular radio network in New York.[18] For example, McCaw filed in 1990 for a use variance in Dobb's Ferry, which was denied on the basis of the unsupported fears of citizen's groups regarding electromagnetic energy. The Zoning Board based its denial in part on McCaw's failure to prove "the absence of possible future hazards to the health and welfare of the community." See Cellular Telephone Company v. Rosenberg, 624 N.E.2d 990, 992 (N.Y. 1993). McCaw was required to appeal the decision, and was finally successful in having it overturned in late 1993, in part because, as the appellate court noted, "the transmission from the cell site would not affect humans, animals or any other organisms." Id. at 995.

As long as state and local governments have the authority to engage in their own individualized evaluations of FCC-approved RF transmitters, they will have the power to undo what the Commission has authorized. As McCaw summarized its experiences in dealing with local regulation of its transmitters: "The aggregate effect of these measures is to delay service to the public,

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[18] See McCaw's Comments in ET Docket No. 93-62, at 20-21 (filed Jan. 25, 1994). McCaw provides many additional examples of its difficulties in obtaining permits for its cellular transmitter sites.

unnecessarily raise costs, and, in some cases, deny service to the public altogether."[19]

C. State and Local Regulators Impose New Licensing Requirements on FCC-Authorized Facilities.

Even if use of a transmitter site is not denied completely, local governments often enact requirements for transmitting facilities that result in an overlay of "licensing" requirements inconsistent with the Commission's. For example, Massachusetts requires all sources of RF radiation to comply with intricate registration and notification procedures.[20] At the time comments on the RF NPRM were being filed, New Jersey was in the process of adopting regulations which would require RF sources to register with the state, pay a substantial "registration fee," and open their facilities to annual inspections by state officials.[21] Compliance with such requirements imposes another layer of regulatory hurdles that Commission licensees must cross before they can provide the service they have already been authorized to deliver.

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[19] McCaw's Comments, at 23 (filed Jan. 24, 1994).

[20] See CBS Inc., et al. Comments in ET Docket No. 93-62, at 43 (filed Jan. 25, 1994).

[21] See Comments of New Jersey Broadcasters Association in ET Docket No. 93-62, at 3 (filed Jan. 25, 1994); Comments of Hammett & Edison in ET Docket No. 93-62, at 6 & nn. 9-10 (filed Jan. 25, 1994); Comments of National Association of Broadcasters in ET Docket No. 93-62 (filed Jan. 25, 1994); Comments of Electromagnetic Energy Policy Alliance in ET Docket No. 93-62 (filed Jan. 25, 1994).

A 1993 resolution of the Village of Wilmette, Illinois, cited above, provides that an applicant for a special use permit for the installation of telecommunications receiver/transmitter equipment must show that the power density of the RF signal or transmission radiation caused by the proposed facility will not exceed .025 $\mu W/cm^2$ at ground level 1,000 feet from the proposed site and will not exceed 1 $\mu W/cm^2$ within a 300-foot radius of the proposed site.[22] This resolution also flatly prohibits installation of a proposed facility within 500 feet of properties occupied at the time of the application as schools, preschools or daycare centers.[23] These requirements are more stringent than the 1992 ANSI standard.

A further example of additional RF requirements was reported by Celpage, Inc., in its comments in this proceeding. Celpage has been burdened with compliance requirements and costs over and above those required by the Commission in the course of providing paging services in Puerto Rico. Pursuant to regulations recently enacted by the Puerto Rican Planning Board, all Commission licensees are required also to obtain a certificate from the Commonwealth of Puerto Rico permit-issuing authority prior to operating any radio transmitter. In addition, the applicant must perform complicated engineering studies, not required by the Commission, before using the transmitter. This has resulted in an

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[22] Exhibit D at 2.

[23] Id.